No. 17-1307

IN THE

Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS, LLP, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE UNITED TRUSTEES ASSOCIATION; ARIZONA TRUSTEE ASSOCIATION; CALIFORNIA MORTGAGE ASSOCIATION AND CALIFORNIA MORTGAGE BANKERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
I. THE UNITED TRUSTEES ASSOCIATION	1
II. THE ARIZONA TRUSTEE ASSOCIATION	1
III. THE CALIFORNIA MORTGAGE ASSOCIATION	2
IV. THE CALIFORNIA MORTGAGE BANKERS ASSOCIATION	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. CALIFORNIA'S COMPREHENSIVE, DETAILED FORECLOSURE STATUTES INCLUDE CONSUMER PROTECTIONS MORE FOCUSED AND EXTENSIVE THAN FDCPA	5
II. NON-JUDICIAL FORECLOSURE BENEFITS CONSUMERS	8
III. CALIFORNIA NON-JUDICIAL FORECLOSURE DOES NOT, AND LEGALLY CANNOT, INCLUDE COLLECTION OF THE SECURED DEBT BY THE TRUSTEE	11

TABLE OF CONTENTS—Continued

Page

IV. THE ROLE OF THE TRUSTEE IN CONDUCTING A NON-JUDICIAL FORECLOSURE IS STRICTLY DEFINED BY STATUTE 13

V. CASES RELIED UPON BY PETITIONER INVOLVE JUDICIAL FORECLOSURE SYSTEMS 16

VI. IT IS IMPOSSIBLE TO DIRECTLY APPLY FDCPA TO THE CONDUCT OF A NON-JUDICIAL FORECLOSURE 19

CONCLUSION 20

APPENDIX

APPENDIX A: "Summary of Key Information" Cal. Civ. Code § 2923.2(c) 1a

APPENDIX B: "Summary of Key Information" Cal. Civ. Code § 2923(d) 4a

TABLE OF AUTHORITIES

CASES Page(s)

Dreyfuss v. Union Bank of California, 24 Cal. 4th 400, 11 P.3d 383 (2000) 12

Fed. Home Loan Mortgage Corp. v. Arrott Associates, Ltd., 60 F.3d 1037 (3d Cir. 1995) 16

Fonteno v. Wells Fargo Bank, 228 Cal. App. 4th 1358, 176 Cal. Rptr. 3d 676 (2014) 16

Glazer v. Chase Home Fin. LLC, 704 F.3d 453 (6th Cir. 2013) 17, 18

Ho Vien-Phuong Thi Ho v. ReconTrust Co., NA, 858 F.3d 568 (9th Cir.), cert. denied sub nom. Ho v. ReconTrust Co., 138 S. Ct. 504, 199 L. Ed. 2d 385 (2017) 12

I. E. Associates v. Safeco Title Ins. Co., 39 Cal. 3d 281, 702 P.2d 596 (1985) 13

Isham v. Gurstel, Staloch & Chargo, P.A., 738 F. Supp. 2d 986 (D. Ariz. 2010) 19

Louisiana Nat. Bank v. Laborde, 527 So. 2d 41 (La. Ct. App. 1988) 17

Kachlon v. Markowitz, 168 Cal. App. 4th 316, 85 Cal. Rptr. 3d 532 (2008) 13

Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006) 16

Kaymark v. Bank of Am., N.A., 783 F.3d 168 (3d Cir. 2015) 16

TABLE OF AUTHORITIES—Continued

Page(s)

McLaughlin v. Phelan Hallinan & Schmieg, LLP, 756 F.3d 240 (3d Cir. 2014) 16

Pacific Valley Bank v. Schwenke, 189 Cal. App. 3d 134, 234 Cal. Rptr. 298 (Ct. App. 1987). 11

Pfeifer v. Countrywide Home Loans, Inc., 211 Cal. App. 4th 1250, 150 Cal. Rptr. 3d 673 (2012) 15-16

Piper v. Portnoff Law Associates, Ltd., 396 F.3d 227 (3d Cir. 2005) 16

Roseleaf Corp. v. Chierighino, 59 Cal.2d 35, 27 Cal.Rptr. 873, 378 P.2d 97 (1963) 12

Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006) 17

STATUTES AND REGULATIONS

12 U.S.C. §§ 2601 et seq. 7

12 U.S.C. §§ 3751 et seq. 9

§ 3751(a) 10

15 U.S.C. §§ 1692 et seq. ..... *passim*

§ 1692c(b) 19

§ 1692c(c) 19

§ 1692e(11) 15

§ 1692f(6) 18

§ 1692n 15

TABLE OF AUTHORITIES—Continued

	Page(s)
Alaska Stat. § 34.20.100	12
Ariz. Rev. Stat. § 33-729(A)	12
Ariz. Rev. Stat. § 33-814(G)	12
2018 Cal. Legis. Serv. Ch. 404 (S.B. 818) (West)	5
Calif. Civil Code §§ 1788 et seq.	15
§ 1788.2(c)	15
Calif. Civ. Code § 1812.700	15
Calif. Civ. Code § 2914.11(a)	6
Calif. Civ. Code § 2920-2924l	5
§ 2920.5(c)	6
§ 2923.3(c)	7
§ 2923.3(d)	7
§ 2923.4	6
§§ 2923.5 – 2923.7	5
§ 2923.5(e)	6
§ 2923.7	5, 6
§ 2924 (1933)	5
§ 2924.12	5
§ 2924.15	5
§ 2924b(b)(1)	14
Calif. Code Civ. Proc. § 580d	4, 11
Calif. Code Civ. Proc. § 726	11

TABLE OF AUTHORITIES—Continued

Page(s)

Louis. LSA-R.S. 13:4106 17

MD Code, Real Prop. § 7-105.1 17

Oreg. Rev. Stat. § 86.797 (formerly OR ST § 86.770) 12

42 Pa.C.S.A. § 8103 16

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12 CFR §1024.2 7

12 CFR §1024.41 7

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Cordell, Larry and Lambie-Hanson, Lauren, "A Cost-Benefit Analysis of Judicial Foreclosure Delay and a Preliminary Look at New Mortgage Servicing Rules" (March 1, 2015). 10

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TABLE OF AUTHORITIES—Continued

Page(s)

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15 M.L.E. Mortgages (Westlaw 2014) 17

Miller & Starr, 5 Cal. Real Est. (4th ed. 2018) 11, 12

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69 Ohio Jur. 3d Mortgages (Westlaw 2014) 17

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22 Standard Pennsylvania Practice (Westlaw 2014) 16

INTEREST OF AMICI CURIAE[1]

This amicus brief is submitted on behalf of the following organizations, whose members are deeply involved in the administration of consumer loans, and who are vitally interested in the application of the federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692 et seq., the "FDCPA") to their activities, including those relating to foreclosure.

I. THE UNITED TRUSTEES ASSOCIATION

The United Trustee's Association ("UTA") is a national, non-profit public benefit corporation whose members include trustees who act under deeds of trust secured by real property in California and other states where non-judicial foreclosure is authorized by state law, as well as members working in industries that provide support services in the non-judicial foreclosure process (e.g., foreclosure agents, lenders, legal newspapers, title companies, posting services and attorneys). UTA's trustee members provide reconveyances (when secured loans are satisfied) and non-judicial foreclosure services (after default) for literally all lenders in the California real estate market.

II. THE ARIZONA TRUSTEE ASSOCIATION

The Arizona Trustee Association ("ATA") is an Arizona statewide non-profit organization that was founded in 1988 to educate its members on real estate foreclosure matters, monitor legislation that may impact the trustee sale process and formulate legislation

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[1] This brief was not authored in whole or in part by counsel for any party to this appeal. No one other than the amici identified herein made any monetary contribution to the preparation or submission of this brief. Counsel for Petitioner and Respondent have filed letters of blanket consent to the filing of amicus briefs.

designed to "foster, promote and improve the quality of trust deed service in general" (Arizona Trustee Association, Mission, available at http://www.arizona trusteeassociation.commission).

The ATA's membership includes attorneys, title companies, escrow companies, financial institutions, loan servicing companies, investors, independent foreclosure companies, newspapers and posting, publication and auction companies. In short, the members comprise the array of individuals and companies involved in the service, support and completion of trustee sales in Arizona.

III. THE CALIFORNIA MORTGAGE ASSOCIATION

The California Mortgage Association ("CMA") is a non-profit trade association of lenders and brokers. Its members include individuals as well as entities that make, arrange, sell, or service privately funded real estate loans secured by deeds of trust on property in California. The respective duties and obligations of loan servicers and trustees under a deed of trust are a matter of great concern to CMA members.

IV. THE CALIFORNIA MORTGAGE BANKERS ASSOCIATION

The California Mortgage Bankers Association is the non-profit trade association for mortgage bankers doing business in California. The Association's membership consists of approximately three hundred (300) companies representing a full spectrum of residential and commercial lenders, servicers, brokers, and a broad range of industry service providers. Almost all the Association's members are based in California, but their business activities and operations often extend into other states and, in some instances, throughout

the entire nation. Based on historical data from the Mortgage Bankers Association of America, nearly twenty percent (20%) of the residential mortgage loans in the United States are originated and underwritten in California.

SUMMARY OF ARGUMENT

Petitioner's fundamental argument is that everyone who participates in a foreclosure must be a "debt collector" within the meaning of the Fair Debt Collection Practices Act, simply because the pendency of a foreclosure will motivate some borrowers to pay the secured debt. This facile conclusion is urged upon the Court without really examining what non-judicial foreclosure consists of in the states which gave rise to the Circuit decisions disagreed with by Petitioner. This amicus brief is submitted on behalf of independent foreclosure trustees in several western states including California, the state in which more home mortgage loans originate than any other.[2] Using the specifics of California's non-judicial foreclosure system by way of example, this brief is intended to call the Court's attention to the features of non-judicial foreclosure which do not comport with the conclusion urged by Petitioner that non-judicial foreclosure is debt collection.

In the wake of the mortgage crisis, California and many other states enacted foreclosure prevention schemes which include disclosures, grace periods and other protections which govern the interaction of lend-

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[2] 2017 NMLS Mortgage Industry Report, Released May 24, 2018 Conference of State Bank Supervisors pp. 14-15. Available at https://mortgage.nationwidelicensingsystem.org/about/Reports/2017%20Mortgage%20Report.pdf

ers and loan servicers with consumers. These protections are specifically focused on foreclosure, are far more extensive than those required under the FDCPA, and have proven effective.

In California and nineteen other states, most but not all located west of the Mississippi, deeds of trust, rather than mortgages, are the most common instrument used in financing home loans. Non-judicial foreclosures are processed by the trustee named in the deed of trust. In California the role of the trustee in actually foreclosing a deed of trust is limited to statutory procedures that require no contact with the borrower other than the mailing, posting and recording of prescribed notices to the borrower and to the public, and if necessary the conduct of an auction sale, issuance of a trustee's deed upon sale, and distribution of any cash proceeds. The role of the trustee, while it requires care and discretion, is strictly regulated, indeed scripted, as far as contact with the borrower is concerned.

The role of the trustee under California's non-judicial foreclosure statutes is limited to realizing upon real property collateral, as distinct from collecting the secured debt. California's "one form of action" law forbids a lender to sue a borrower on a debt which is secured by real property. Antideficiency statutes in effect in California and other western states forbid a lender from suing a borrower following the completion of a non-judicial foreclosure.

Applying the requirements of FDCPA to non-judicial foreclosure would create anomalies that could not be resolved even by amending state foreclosure statutes. For example, FDCPA forbids a debt collector to contact third parties. Yet one aim of foreclosure is

to obtain, for the benefit of all parties including the borrower, the maximum recovery from a foreclosure sale by encouraging competitive bidding through the use of published notices identifying the subject property and the amount secured.

ARGUMENT

I. CALIFORNIA'S COMPREHENSIVE, DETAILED FORECLOSURE STATUTES INCLUDE CONSUMER PROTECTIONS MORE FOCUSED AND EXTENSIVE THAN FDCPA

Beginning with the enactment of Civil Code section 2924 in 1933, the state of California has adopted, added to and refined a complex, detailed and restrictive set of statutes which govern non-judicial foreclosures under powers of sale contained in deeds of trust. Currently, Civil Code sections 2920 through 2924*l*, which cover the foreclosure process, contain over 36,000 words This comprehensive and extremely detailed system governs not only the mechanics of foreclosure, in which the trustee is involved, but also foreclosure prevention in which the lenders and loan servicers are involved. The role and responsibilities of a trustee under a California deed of trust are exhaustively laid out by statute.

In California, consumer protection relating to mortgage defaults applies before foreclosure may even be commenced. The "Homeowners Bill of Rights" ("HOBR")[3] was enacted for the purpose of ensuring that "as part

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[3] Calif. Civ. Code §§ 2923.5 – 2923.7, 2924.12, 2924.15 and related sections. Portion of HOBR which expired under sunset provisions have been reenacted, effective January 1, 2019. 2018 Cal. Legis. Serv. Ch. 404 (S.B. 818) (West); Cal. Civ. Code § 2923.7

of the non-judicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure." Calif. Civ. Code § 2923.4.

Under HOBR, a lender or loan servicer may not direct the trustee to begin a foreclosure until at least thirty days after initial contact is made or after having satisfied due diligence requirements, which include sending a first-class letter, attempting to call the borrower by telephone at least three times at different hours and on different days, and then sending a certified letter.[4]

Mortgage servicers are restricted from advancing the foreclosure process if the homeowner is working on securing a loan modification.[5] HOBR guarantees a single point of contact with the lender and loan servicer so that they will deal with a person or team who knows the facts of their case and has responsibility for their application for a loan modification.[6]

The additional notices and grace periods required by HOBR apply to the administration of a loan by mortgage lenders and loan servicers, and not to trustees under trust deeds, whose role continues to be strictly confined to processing the foreclosure itself.

If a lender or loan servicer is permitted to commence a foreclosure it must direct the trustee under the deed of trust to mail, record and post a series of two notices, the content of which is prescribed in detail by statute.

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[4] Cal. Civ. Code § 2923.5(e).

[5] Cal. Civ. Code § 2914.11(a); 2920.5(c).

[6] Cal. Civ. Code § 2923.7.

The first such notice, called the "Notice of Default" must be accompanied by a "Summary of Key Information" in the form of Appendix 1 to this brief, translated into Spanish, Chinese, Tagalog, Vietnamese and Korean.[7]

After a Notice of Default is recorded and served in the prescribed manner, the trustee under a California deed of trust can take no action for the next three months. After that statutory waiting period has expired the lender or loan servicer may direct the trustee to prepare a Notice of Trustee's Sale to be recorded, served by certified mail, posted on the property and published in a newspaper. An additional waiting period of at least twenty days ensues before a foreclosure sale may actually be conducted. The Notice of Trustee's Sale is required to be accompanied by another "Summary of Key Information, in the form of Appendix 2.[8]

All of these procedures are overlaid by Regulation X promulgated by the Consumer Finance Protection Board as authorized by the Real Estate Settlement Procedures Act (RESPA).[9] CFPB's lengthy, detailed rule on loss mitigation procedures[10] governs the servicing of defaulted "federally related" mortgage loans.[11] This loss mitigation rule imposes a waiting period of 120 days after default before a foreclosure may be commenced. It also governs in detail the handling of applications for mortgage loan modifications.

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[7] Cal. Civ. Code § 2923.3(c).

[8] Cal. Civ. Code § 2923.3(d)

[9] 12 U.S.C. §§ 2601 et seq.

[10] 12 CFR §1024.41

[11] 12 CFR § 1024.2

California's foreclosure statutes provide practical, meaningful and effective consumer protections because they are drafted specifically to address mortgage loan defaults. A paper prepared jointly by Prof. Stuart Gabriel of UCLA, Prof. Chandler Lutz of the Copenhagen Business School, and Matteo Iacoviello Chief, Division of the International Finance of the Board of Governors of the Federal Reserve System, concluded that California's consumer – oriented foreclosure laws "prevented 124,000 California foreclosures, increased house prices by 6.2 percent, and created $310 billion of housing wealth [and were] highly effective in mitigating foreclosures and stabilizing housing markets."[12]

Imposing the comparatively sparse and simplistic requirements of FDCPA would add nothing to the protections offered by these laws except confusion. And as explained below the unnecessary imposition of FDCPA will quite literally disable beyond repair the system of non-judicial foreclosure.

II. NON-JUDICIAL FORECLOSURE BENEFITS CONSUMERS

Petitioner is asking the Court to impose unnecessary and ill-fitting regulations which will cripple the non-judicial foreclosure process, as explained below. That incompatibility is disregarded by Petitioner, and by amici filing briefs in support of Petitioner, perhaps for the reason that they are hostile to the entire system of non-judicial foreclosure. For example, amicus National Consumer Law Center has published a paper

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[12] Gabriel, Iacoviello & Lutz, "A Crisis of Missed Opportunities? Foreclosure Costs and Mortgage Modification During the Great Recession," 2017 Available at https://lusk.usc.edu/sites/default/files/attachments/Stuart_Gabriel.pdf

advocating court involvement in all foreclosures.[13] That view is far outside the mainstream. The vast majority of foreclosures are conducted non-judicially in those 33 states in which a non-judicial procedure is available by statute.

The National Conference of Commissioners on Uniform State Laws ("NCCULA") has proposed a Uniform Non-judicial Foreclosure Act ("UNFA") for adoption in all states. In its Summary of the proposed uniform act, NCCULA stated:[14]

> In the great majority of foreclosures, judicial involvement is unnecessary because there is no dispute between the debtor and creditor. Using the time of judges and the machinery of the courts to conduct routine foreclosures is often a misallocation of public funds as well as a waste of the secured creditor's resources. The delays and inefficiency associated with foreclosure by judicial action are costly. They increase the risk of vandalism, fire loss, depreciation, damage, and waste. The resulting costs raise the prices of private mortgages and erodes the economic value of government subsidy program involving mortgages.

By federal statute, non-judicial foreclosure is made available in all states under title 12, chapter 38A, United States Code,(12 U.S.C. §§ 3751 et seq) as to

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[13] Rao & Walsh, National Consumer Law Center, Inc., "Foreclosing a Dream, State Laws Deprive Homeowners of Basic Protections" (2009) https://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf

[14] NCCULA "Non-judicial Foreclosure Act Summary" (2018) Available at http://www.uniformlaws.org/ActSummary.aspx?title=Non-judicial%20Foreclosure%20Act

mortgages held by the United States Department Housing and Urban Development. Title 12 section 3751(a) cites essentially the same reasons stated by the NCCULA in the above quoted summary.

A working paper[15] published by the Federal Reserve Bank of Philadelphia in March, 2015, concluded in part:

> [T]he longer timelines associated with judicial intervention in the foreclosure process have led to neither more cures nor more modifications, just more persistently delinquent borrowers. Third, there are other potentially large costs in terms of slower house price recovery and less "boomerang borrowing" by post-foreclosure consumers in judicial states, greater house price depreciation from nearby foreclosures, and negative neighborhood-level effects caused by foreclosure delays. In short, judicial review of foreclosures imposes large costs with few, if any, offsetting benefits.

The non-judicial foreclosure system, now in effect in a majority of states, and adopted by Congress for the foreclosure of HUD mortgages in all states, is not an enemy of consumers. It benefits consumers. The decision as to whether to adopt that system, and how, is a question that is properly left to each state. No benefit to consumers would accrue from the imposition

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[15] Cordell, Larry and Lambie-Hanson, Lauren, A Cost-Benefit Analysis of Judicial Foreclosure Delay and a Preliminary Look at New Mortgage Servicing Rules (March 1, 2015). FRB of Philadelphia Working Paper No. 15-14. p. 3. Available at https://philadelphiafed.org/-/media/research-and-data/publications/working-papers/2015/wp15-14.pdf

of the ill-fitting rules of FDCPA, as advocated by Petitioner. A detriment to consumers would result were the non-judicial foreclosure system to be destroyed by the application of FDCPA as is urged by the Petitioner.

III. CALIFORNIA NON-JUDICIAL FORECLOSURE DOES NOT, AND LEGALLY CANNOT, INCLUDE COLLECTION OF THE SECURED DEBT BY THE TRUSTEE

Non-judicial foreclosure is about realizing upon the security for mortgage debts, and not about collecting money. In California, two statutes preclude a mortgage lender from collecting a mortgage debt except in the context of a judicial foreclosure. California Code of Civil Procedure section 726, part of the chapter governing judicial foreclosure, provides in part that "[t]here can be but one form of action for the recovery of any debt . . . secured by mortgage upon real property . . . .which action shall be in accordance with the provisions of this chapter." This is referred to as the "one action rule."[16] In California "[i]f the beneficiary seeks a deficiency judgment in excess of the value of the security, he is . . . limited to a foreclosure by judicial process rather than by operation of the power of sale under the deed of trust." *Pacific Valley Bank v. Schwenke,* 189 Cal. App. 3d 134, 140, 234 Cal. Rptr. 298, 301 (Ct. App. 1987). The lender "is not allowed to circumvent the statute by divesting himself of his security without the consent of the debtor." Id.

California Code of Civil Procedure section 580d provides that: "no deficiency shall be owed or collected, and no deficiency judgment shall be rendered for a deficiency on a note secured by a deed of trust or

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[16] Miller & Starr, 5 Cal. Real Est. § 13:194 (4th ed.)

mortgage. . . in any case in which the real property . . . has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust." This statute is "a complete bar to a personal judgment on the debt once the trustee's sale is complete." Miller & Starr, 5 Cal. Real Est. § 13:259 (4th ed. 2018). Under this and similar anti-deficiency statutes adopted in other states[17] "foreclosure extinguishes the entire debt even if it results in a recovery of less than the amount of the debt." *Ho Vien-Phuong Thi Ho v. ReconTrust Co., NA*, 858 F.3d 568, 572 (9th Cir.), cert. denied sub nom. Ho v. ReconTrust Co., 138 S. Ct. 504, 199 L. Ed. 2d 385 (2017)

"The fundamental trade-off exacted from a secured creditor who obtains the expedited benefits of a non-judicial foreclosure and trustee's sale is the loss of the right to recover a deficiency judgment on the debt." Miller & Starr, 5 Cal. Real Est. § 13:194 (4th ed.). The Court in *Dreyfuss v. Union Bank of California,* 24 Cal. 4th 400, 411, 11 P.3d 383, 390 (2000) explained:

> Non-judicial foreclosure proceedings must be conducted by auction in a fair and open manner, with the property sold to the highest bidder . . . permitting the borrower, or anyone else, to participate in setting the price for the property. Most important, the borrower is relieved from any personal liability on the debt. (See *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 42, 27 Cal.Rptr. 873, 378

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[17] Deficiency judgments after non-judicial foreclosure are barred in California as well as in Alaska, Alaska Stat. § 34.20.100; Oregon ORS. § 86.797 (formerly OR ST § 86.770); Washington (as to consumer loans) RCW § 61.24.100(1); and in Arizona as to property two and one-half acres or less limited to single one-family or a single two-family dwelling. ARS §§ 33-729(A) & 33-814(G)

> P.2d 97.) Thus, in the event of a default, the borrower stands to lose only such property as he or she specifically chose to place at risk, leaving the creditor to carry the burden of any additional loss in value if the amount of the debt exceeds the value of the assets pledged as security for the loan.

Petitioner can only argue that a non-judicial foreclosure amounts to an "indirect" attempt to collect the secured debt because the pendency of a foreclosure will motivate some borrowers to pay the secured debt. This is the same as arguing, for example, that adverse credit reporting is debt collection, even though furnishing information to a consumer reporting agency involves no contact at all with the consumer. Credit reporting is of course not debt collection, and neither is non-judicial foreclosure. Both processes should be, and now are, regulated by separate statutory systems with detailed provisions specific to their respective subjects.

IV. THE ROLE OF THE TRUSTEE IN CONDUCTING A NON-JUDICIAL FORECLOSURE IS STRICTLY DEFINED BY STATUTE

Trustees under deeds of trust are not free agents charged with collecting debts. Their function is to process foreclosures to realize upon collateral following specific statutory rules. For example, under California non-judicial foreclosure law, "[t]he scope and nature of the trustee's duties are exclusively defined by the deed of trust and the governing statutes." *Kachlon v. Markowitz,* 168 Cal. App. 4th 316, 335, 85 Cal. Rptr. 3d 532, 546 (2008). As the California Supreme Court explained in *I. E. Associates*

v. Safeco Title Ins. Co., 39 Cal. 3d 281, 288, 702 P.2d 596, 598 (1985):

> The non-judicial foreclosure statutes - an alternative to judicial foreclosure - reflect a carefully crafted balancing of the interests of beneficiaries, trustors, and trustees. Beneficiaries, of course, want quick and inexpensive recovery of amounts due under promissory notes in default. Trustors, on the other hand, need protection against the forfeiture of valuable property rights. Trustees, the middlemen, need to have clearly defined responsibilities to enable them to discharge their duties efficiently and to avoid embroiling the parties in time-consuming and costly litigation. In taking all of these concerns into account, the statutes strike an overall balance favoring the protection of trustors.

The two foreclosure notices which are mandated under California law, the Notice of Default and the Notice of Trustee's sale, consist of statutorily required language which does not involve the trustee in the collection of the secured debt. For example, the Notice of Default required by California Civil Code section 2924b(b)(1) includes the following:

> If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the property, or pay other obligations as required in the note and deed of trust or mortgage, *the beneficiary or mortgagee* may insist that you do so in order to reinstate your account in good standing. In addition, the *beneficiary or mortgagee* may require as a condition to reinstatement that you provide reliable written evidence that

> you paid all senior liens, property taxes, and hazard insurance premiums.
>
> Upon your written request, *the beneficiary or mortgagee* will give you a written itemization of the entire amount you must pay. . . . However, you and your beneficiary or mortgagee may mutually agree in writing prior to the time the notice of sale is posted (which may not be earlier than the end of the three month period stated above) to, among other things, (1) provide additional time in which to cure the default . . . .[*italics* added]

Nothing in the statutory notice suggests that the trustee is collecting debts on behalf of the lender.

Because the activities of the trustee under a deed of trust are strictly limited by this detailed statutory scheme, the California legislature has seen fit to expressly exclude trustees from the definition of "debt collector" under the California analogue of the FDCPA, the Rosenthal Fair Debt Collection Practices Act, Civil Code sections 1788 et seq.[18] California state appellate courts called upon to determine whether trustees under deeds of trust are subject to FDCPA have also ruled that "giving notice of a foreclosure sale to a consumer as required by the Civil Code does not

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[18] The Rosenthal Act was adopted under the authority of FDCPA section 1692n, which provides that in effect that the FDCPA does not pre-empt state laws which provide protection greater than that provided under the FDCPA. Among other things, the Rosenthal Act requires more extensive warning notices than does the FDCPA (Cf. 15 U.S.C. § 1692e(11) & Calif. Civ. Code § 1812.700), and is not confined in its application to third party debt collectors. Calif. Civ. Code §1788.2(c). The exclusion of trustees under deeds of trust from the definition of "debt collector" is contained in Calif. Civ. Code § 1788.2(c).

constitute debt collection activity under the FDCPA." *Pfeifer v. Countrywide Home Loans, Inc.*, 211 Cal. App. 4th 1250, 1264, 150 Cal. Rptr. 3d 673 (2012). Accord, *Fonteno v. Wells Fargo Bank*, 228 Cal. App. 4th 1358, 1375, 176 Cal. Rptr. 3d 676, 690 (2014).

V. CASES RELIED UPON BY PETITIONER INVOLVE JUDICIAL FORECLOSURE SYSTEMS

Petitioner's Brief cites cases from four Circuit Courts of Appeals in support of the position that non-judicial foreclosure constitutes debt collection under the FDCPA. None of these decisions involves non-judicial foreclosure. Each of these cases is discussed very briefly below.

Piper v. Portnoff Law Associates, Ltd., 396 F.3d 227 (3d Cir. 2005) involved the collection of overdue water and sewer bills by obtaining and enforcing by execution an "in rem" judgment of a Pennsylvania court. The law of Pennsylvania allows for a money judgment to be taken in connection with such an action.[19] There is no provision under Pennsylvania law for a non-judicial foreclosure sale. The two other circuit decisions cited by Petitioner, *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015) and *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240 (3d Cir. 2014) also originated in Pennsylvania.

Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006) involved an "executory process foreclosure" on a mobile home. Under Louisiana law, a personal judgment may

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[19] 42 Pa.C.S.A. § 8103; The law of Pennsylvania allows a mortgagee to sue on a mortgage debt without foreclosing at all, or to foreclose by an in rem and action and obtain a deficiency judgment in that action. See, 22 Standard Pennsylvania Practice 2d § 121:3 (Westlaw 2014). See, e.g., *Fed. Home Loan Mortgage Corp. v. Arrott Associates, Ltd.*, 60 F.3d 1037 (3d Cir. 1995)

issue for any deficiency remaining after a foreclosure sale (i.e., a sheriff's sale).[20] Louisiana law does not prohibit seeking a money judgment against the consumer after the home was sold.

Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006) originated in Maryland, where real property foreclosures are accomplished by judicial action, not by non-judicial means.[21] Deficiency judgments after the foreclosure sale are permitted in Maryland.[22]

In *Glazer v. Chase Home Fin. LLC,* 704 F.3d 453 (6th Cir. 2013) the gravamen of the claim was that a lawyer obtained a judicial decree of foreclosure by falsely representing that his client actually owned the secured note. In Ohio, a mortgagee has a choice of remedies. One is foreclosure under a power of sale which may be contained in the instrument. The other is by judicial action. In the case of a judicial foreclosure, such as that involved in *Glazer*, a deficiency judgment is available if the lender seeks one within two years after completion of the sale.[23] The opinion in *Glazer* rejects the view that mortgage foreclosure is not debt collection, and holds that "when a money judgment is sought against the debtor in connection with the foreclosure there *has been* debt collection, because there was an attempt to collect money. [*italics*

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[20] See, LSA-R.S. 13:4106; See, e.g., *Louisiana Nat. Bank v. Laborde,* 527 So. 2d 41 (La. Ct. App. 1988).

[21] MD Code, Real Property, § 7-105.1

[22] See generally, 15 M.L.E. Mortgages §§ 125, 197 (Westlaw 2014).

[23] See generally, 69 Ohio Jur. 3d Mortgages §§ 286 & 289 (Westlaw 2014).

in original]" *Glazer v. Chase Home Fin.*, supra., 704 F.3d at 460.

While the court in *Glazer* expresses its conclusions in sweeping statements, its articulated reasons for those conclusions demonstrate that it was thinking in terms of foreclosure law and procedures in Ohio and perhaps other similar jurisdictions within the Sixth Circuit, and that it was not thinking about trustee's sales in jurisdictions like California. For example, the Court says the following in reference to FDCPA section 1692f(6) which it says concerns "non-judicial repossession abuses": "Other than repossession agencies and their agents, we can think of no others whose only role in the collection process is the enforcement of security interests. A lawyer principally engaged in mortgage foreclosure does not meet this criteria, for he must communicate with the debtor regarding the debt during the foreclosure proceedings."[24]

It seems likely that the Sixth Circuit panel in *Glazer* could "think of no others whose only role in the collection process is the enforcement of security interests" because it was unfamiliar with non-judicial foreclosure procedures in California, where the trustee's role is confined to foreclosure and not debt collection.

As another example, the opinion in *Glazer* argues that foreclosure is the same as debt collection because "[a]s one commentator has observed, the existence of redemption rights and the potential for deficiency judgments demonstrate that the purpose of foreclosure is to obtain payment on the underlying home loan. Such remedies would not exist if foreclosure were not undertaken for the purpose of obtaining payment

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[24] *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 464 (6th Cir. 2013).

. . . . Accordingly, mortgage foreclosure is debt collection under the FDCPA." *Glazer*, supra., 704 F.3d at 461. In contrast, in California there can be no deficiency judgment and there is no redemption right following a non-judicial foreclosure.

VI. IT IS IMPOSSIBLE TO DIRECTLY APPLY FDCPA TO THE CONDUCT OF A NON-JUDICIAL FORECLOSURE

Should this Court rule that California trustees are "debt collectors" subject to all of the requirements of the FDCPA, the result would not be simply that trustees would be required to send additional notices to consumers in addition to the statutory foreclosure notices. Imposition of the FDCPA on the non-judicial foreclosure process would prohibit trustees from following the procedures prescribed by law for a valid foreclosure.

FDCPA section 1692c(c) prohibits a debt collector from communicating further with a consumer if the consumer notifies the debt collector in writing, expressing the wish that the debt collector cease communication. Courts have held that written communications such as "kindly don't bother me anymore" are sufficient to legally prohibit further communication. *Isham v. Gurstel, Staloch & Chargo, P.A.*, 738 F. Supp. 2d 986, 994-95 (D. Ariz. 2010). Compliance by a trustee would deprive the consumer of critical notices such as the Notice of Trustee's Sale, advising the borrower of the date, time and place of the foreclosure sale and of the amount secured by the deed of trust, which the lender would be authorized to bid at the sale.

FDCPA section 1692c(b) generally prohibits a debt collector from communicating with third parties concerning the subject debt. The exceptions built in to the

FDCPA refer to judicial, not non-judicial, communications and remedies. Yet, as set forth above, the trustee is required by statute to record notices in the public records, and mail them to junior lienholders and others, and finally to post them on the property and publish them in the newspaper. These third party communications are vital to advertise the foreclosure, in part for the benefit of the consumer, as well as to warn those whose junior liens would be extinguished by the foreclosure. All of these communications would become illegal if the FDCPA were applied to non-judicial foreclosures.

These serious conflicts demonstrate that the provisions of the FDCPA, while sensible in the context of debt collection, are catastrophic and nonsensical when applied to non-judicial foreclosures. The Court should assume that such consequences were never intended by Congress. These conflicts are themselves strong guides to the interpretation of "debt collector" under the FDCPA.

CONCLUSION

The activities of trustees under deeds of trust are confined to specific actions set forth in detailed foreclosure statutes such as the California statutes discussed above. These communications are prescribed by laws that are adopted by each state to accommodate, in fact to accomplish, consumer protection. As an example, California non-judicial foreclosure statutes already provide a degree of disclosure and protection to consumers far beyond that contemplated by the FDCPA. A decision to graft the requirements of FDCPA onto that system would not aid consumers, would foster unnecessary litigation and raise issues which would be unsolvable without ignoring or re-writing key provisions of the FDCPA.

For all of these reasons, the judgment should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

[Required to be attached to the Notice of Default by Cal.Civ. Code § 2923.3(c)(2)]

SUMMARY OF KEY INFORMATION

The attached notice of default was sent to [name of the trustor], in relation to [description of the property that secures the mortgage or deed of trust in default]. This property may be sold to satisfy your obligation and any other obligation secured by the deed of trust or mortgage that is in default. [Trustor] has, as described in the notice of default, breached the mortgage or deed of trust on the property described above.

IMPORTANT NOTICE: IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS, IT MAY BE SOLD WITHOUT ANY COURT ACTION, and you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally five business days prior to the date set for the sale of your property. No sale date may be set until approximately 90 days from the date the attached notice of default may be recorded (which date of recordation appears on the notice).

This amount is _____ as of ___ (date) _____ and will increase until your account becomes current.

While your property is in foreclosure, you still must pay other obligations (such as insurance and taxes) required by your note and deed of trust or mortgage. If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the

property, or pay other obligations as required in the note and deed of trust or mortgage, the beneficiary or mortgagee may insist that you do so in order to reinstate your account in good standing. In addition, the beneficiary or mortgagee may require as a condition to reinstatement that you provide reliable written evidence that you paid all senior liens, property taxes, and hazard insurance premiums.

Upon your written request, the beneficiary or mortgagee will give you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all amounts in default at the time payment is made. However, you and your beneficiary or mortgagee may mutually agree in writing prior to the time the notice of sale is posted (which may not be earlier than three months after this notice of default is recorded) to, among other things, (1) provide additional time in which to cure the default by transfer of the property or otherwise; or (2) establish a schedule of payments in order to cure your default; or both (1) and (2).

Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your creditor permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your creditor.

To find out the amount you must pay, or to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact:

_____

(Name of beneficiary or mortgagee)

_____

(Mailing address)

_____

(Telephone)

If you have any questions, you should contact a lawyer or the governmental agency which may have insured your loan.

Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.

Remember, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.

If you would like additional copies of this summary, you may obtain them by calling [insert telephone number].

APPENDIX B

[Required to be attached to the Notice of Default by Cal.Civ. Code § 2923.3(d)(2)]

SUMMARY OF KEY INFORMATION

The attached notice of sale was sent to [trustor], in relation to [description of the property that secures the mortgage or deed of trust in default].

YOU ARE IN DEFAULT UNDER A (Deed of trust or mortgage) DATED ____. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE.

IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER.

The total amount due in the notice of sale is ____.

Your property is scheduled to be sold on [insert date and time of sale] at [insert location of sale].

However, the sale date shown on the attached notice of sale may be postponed one or more times by the mortgagee, beneficiary, trustee, or a court, pursuant to Section 2924g of the California Civil Code. The law requires that information about trustee sale postponements be made av. ilable to you and to the public, as a courtesy to those not present at the sale. If you wish to learn whether your sale date has been postponed, and, if applicable, the rescheduled time and date for the sale of this property, you may call [telephone number for information regarding the trustee's sale] or visit this Internet Web site [Internet Web site address for information regarding the sale of this property], using the file number assigned to this case [case file number]. Information about postponements that are very short in duration or that occur close in time to the

scheduled sale may not immediately be reflected in the telephone information or on the Internet Web site. The best way to verify postponement information is to attend the scheduled sale.

If you would like additional copies of this summary, you may obtain them by calling [insert telephone number].